Supreme Court of the United States.

No. 23.—October Term, 1902.

Annie Andrews, Plaintiff in Error, vs. Kate H. Andrews. } In error to the Supreme Judicial Court of the State of Massachusetts.

[January 19, 1903.]

The plaintiff and the defendant in error, each claiming to be the lawful widow of Charles S. Andrews, petitioned to be appointed administratrix of his estate. The facts were found as follows:

Charles S. and Kate H. Andrews married in Boston in April, 1887, and they lived together at their matrimonial domicil in the State of Massachusetts. In April, 1890, the wife began a suit for separate maintenance, which was dismissed in December, 1890, because of a settlement between the parties, adjusting their property relations.

In the summer of 1891, Charles S. Andrews, to quote from the findings, "being then a citizen of Massachusetts and domiciled in Boston, went to South Dakota to obtain a divorce for a cause which occurred here while the parties resided here, and which would not authorize a divorce by the laws of this Commonwealth; he remained personally in that State a period of time longer than is necessary by the laws of said State to gain a domicil there, and on November 19, 1891, filed a petition for divorce in the proper court of that State."

Concerning the conduct of Charles S. Andrews and his purpose to obtain a divorce in South Dakota, whilst retaining his domicil in Massachusetts, the facts were found as follows:

"The husband went to South Dakota and took up his residence there to get this divorce, and that he intended to return to this State when the business was finished. He boarded at a hotel in Sioux Falls all the time, and had no other business there than the prosecution of this divorce suit. I find, however, that he voted there at a State election in the fall of 1891, claiming the right to do so as a *bona fide* resident under the laws of that State. His intention was to become a resident of that State for the purpose of getting his divorce, and to that end to do all that was needful to make him such a resident, and I find he became a resident if, as a matter of law, such finding is warranted in the facts above stated."

And further, that—

"The parties had never lived together as husband and wife in South Dakota, nor was it claimed that either one of them was ever in that State except as above stated."

With reference to the divorce proceedings in South Dakota it was found as follows:

"The wife received notice, and appeared by counsel and filed an answer, denying that the libellant was then or ever had been a *bona fide* resident of South Dakota, or that she had deserted him, and setting up cruelty on his part toward her. This case was settled, so far as the parties were concerned, in accordance with the terms of the agreement of April 22, 1892, signed by the wife and consented to by the husband, and, for the purpose of carrying out her agreement 'to consent to the granting of divorce for desertion in South Dakota,' she requested her counsel there to withdraw her appearance in that suit, which they did, and thereafterwards, namely, on May 6, 1892, a decree granting the divorce was passed, and within a day or two afterwards the said Charles, having attained the object of his sojourn in that State, returned to this Commonwealth, where he resided and was domiciled until his death, which occurred in October, 1897."

By the agreement of April 22, 1892, to which reference is made in the finding just quoted, it was stipulated that a payment of a sum of money should be made by Charles S. Andrews to his wife, and she authorized her attorney on the receipt of the money to execute certain papers, and it was then provided as follows:

"Fourth. Upon the execution of such papers M. F. Dickinson, Jr., is authorized in my name to consent to the granting of divorce for desertion in the South Dakota court."

Respecting the claim of Annie Andrews to be the wife of Charles S. Andrews, it was found as follows:

"Upon his return to this State he soon met the petitioner, and on January 11, 1893, they were married in Boston, and ever after that lived as husband and wife in Boston, and were recognized as such by all until his death. The issue of this marriage are two children, still living."

It was additionally found that Annie Andrews married Charles S. Andrews in good faith and in ignorance of any illegality in the South Dakota divorce, and that Kate H. Andrews, as far as she had the power to do so, had connived at and acquiesced in the South Dakota divorce, had preferred no claim thereafter to be the wife of Charles S. Andrews until his death when in this case she asserted her right to administer his estate as his lawful widow.

From the evidence above stated the ultimate facts were found to be that Andrews had always retained his domicil in Massachusetts, had gone to Dakota for the purpose of obtaining a divorce, in fraud of the laws of Massachusetts, and with the intention of returning to that State when the divorce was procured, and hence that he had never acquired a *bona fide* domicil in South Dakota. Applying a statute of the State of Massachusetts forbidding the enforcement in that State of a divorce obtained

nder the circumstances stated, it was decided that the decree rendered n South Dakota was void in the State of Massachusetts, and hence that Kate H. Andrews was the widow of Charles S. Andrews and entitled to dminister his estate. (176 Mass. 92.)

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

It was suggested at bar that this court was without jurisdiction. But it is unquestionable that rights under the Constitution of the United States were expressly and in due time asserted, and that the effect of the judgment was to deny these rights. Indeed, when the argument is analyzed we think it is apparent that it but asserts that, as the court below committed no error in deciding the Federal controversy, therefore there is no Federal question for review. But the power to decide whether the Federal issue was rightly disposed of involves the exercise of jurisdiction. *Penn Mutual Life Insurance Company* v. *Austin*, (1897) 168 U. S. 685. As the Federal question was not unsubstantial and frivolous, we pass to a consideration of the merits of the case.

The statute of the State of Massachusetts, in virtue of which the court refused to give effect to the judgment of divorce, is as follows:

"SEC. 35. A divorce decreed in another State or country according to the laws thereof, by a court having jurisdiction of the cause and of both the parties, shall be valid and effectual in this Commonwealth; but if an inhabitant of this Commonwealth goes into another State or country to obtain a divorce for a cause which occurred here, while the parties resided here, or for a cause which would not authorize a divorce by the laws of this Commonwealth, a divorce so obtained shall be of no force or effect in this Commonwealth." (2 Comp. Laws Mass. 1902, ch. 152, p. 1357; Pub. St. c. 146, § 41.)

It is clear that this statute, as a general rule, directs the courts of Massachusetts to give effect to decrees of divorce rendered in another State or country by a court having jurisdiction. It is equally clear that the statute prohibits an inhabitant of Massachusetts from going into another State to obtain a divorce, for a cause which occurred in Massachusetts whilst the parties were domiciled there, or for a cause which would not have authorized a divorce by the law of Massachusetts, and that the statute forbids the courts of Massachusetts from giving effect to a judgment of divorce obtained in violation of these prohibitions. That the statute establishes a rule of public policy is undeniable. Did the court fail to give effect to Federal rights when it applied the provisions of the statute to this case, and, therefore, refused to enforce the South Dakota decree? In other words, the question for decision is, does the statute conflict with the Constitution of the United States? In coming to the solution of this question

it is essential, we repeat, to bear always in mind that the prohibitions of the statute are directed solely to citizens of Massachusetts domiciled therein, and that it only forbids the enforcement in Massachusetts of a divorce obtained in another State by a citizen of Massachusetts who, in fraud of the laws of the State of Massachusetts, whilst retaining his domicil, goes into another State for the purpose of there procuring a decree of divorce.

We shall test the constitutionality of the statute, first by a consideration of the nature of the contract of marriage and the authority which government possesses over the subject; and, secondly, by the application of the principles thus to be developed to the case in hand.

1. That marriage, viewed solely as a civil relation, possesses elements of contract is obvious. But it is also elementary that marriage, even considering it as only a civil contract, is so interwoven with the very fabric of society that it cannot be entered into except as authorized by law, and that it may not, when once entered into, be dissolved by the mere consent of the parties. It would be superfluous to cite the many authorities establishing these truisms, and we therefore are content to excerpt a statement of the doctrine on the subject contained in the opinion of this court delivered by Mr. Justice Field, in *Maynard* v. *Hill*, (1888) 125 U. S. 190:

"Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of the people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effect upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." (p. 205.)

* * * * * *

"It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts as a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is, of course, essential to its existence; but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." (Ib. p. 210.)

It follows that the statute in question was but the exercise of an essential attribute of government, to dispute the possession of which would be to deny the authority of the State of Massachusetts to legislate over a subject

erently domestic in its nature and upon which the existence of civilized iety depends. True, it is asserted that the result just above indicated l not necessarily flow from the conclusion that the statute is repugnant the Constitution of the United States. The decision that the Constitu- n compels the State of Massachusetts to give effect to the decree of orce rendered in South Dakota cannot, it is insisted, in the nature of ngs be an abridgment of the authority of the State of Massachusetts er a subject within its legislative power, since such ruling would only ect the enforcement of a decree rendered in another State and therefore thout the territory of Massachusetts. In reason it cannot, it is argued, held to the contrary without disregarding the distinction between acts ich are done within and those which are performed without the terri- ry of a particular State. But this disregards the fact that the prohi- tions of the statute, so far as necessary to be considered for the purposes this case, are directed, not against the enforcement of divorces obtained other States as to persons domiciled in such States, but against the ecution in Massachusetts of decrees of divorce obtained in other States persons who are domiciled in Massachusetts and who go into such her States with the purpose of practicing a fraud upon the laws of the tate of their domicil; that is, to procure a divorce without obtaining a *ona fide* domicil in such other State. This being the scope of the statute, is evident, as we shall hereafter have occasion to show, that the argu- ent, whilst apparently conceding the power of the State to regulate the issolution of marriage among its own citizens, yet, in substance, neces- arily denies the possession of such power by the State. But, it is further rgued, as the Constitution of the United States is the paramount law, and s, by that instrument, the State of Massachusetts is compelled to give ffect to the decree, it follows that the Constitution of the United States nust prevail, whatever may be the result of enforcing it.

Before coming to consider the clause of the Constitution of the United States upon which the proposition is rested, let us more precisely weigh the consequences which must come from upholding the contention, not only as it may abridge the authority of the State of Massachusetts, but as it may concern the powers of government existing under the Constitution, whether State or Federal.

It cannot be doubted that if a State may not forbid the enforcement within its borders of a decree of divorce procured by its own citizens who, whilst retaining their domicil in the prohibiting State, have gone into another State to procure a divorce in fraud of the laws of the domicil, that the existence of all efficacious power on the subject of divorce will be at an end. This must follow if it be conceded that one who is domiciled in a State may whenever he chooses go into another State and, without

acquiring a *bona fide* domicil therein, obtain a divorce, and then compel the State of the domicil to give full effect to the divorce thus fraudulently procured. Of course, the destruction of all substantial legislative power over the subject of the dissolution of the marriage tie which would result would be equally applicable to every State in the Union. Now, as it is certain that the Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage in the States or its dissolution, the result would be that the Constitution of the United States has not only deprived the States of power on the subject, but whilst doing so has delegated no authority in the premises to the government of the United States It would thus come to pass that the governments, State and Federal, are bereft by the operation of the Constitution of the United States of a power which must belong to and somewhere reside in every civilized government. This would be but to declare that, in a necessary aspect, government had been destroyed by the adoption of the Constitution. And such result would be reached by holding that a power of local government vested in the States when the Constitution was adopted had been lost to the States, though not delegated to the Federal government, because each State was endowed as a consequence of the adoption of the Constitution with the means of destroying the authority with respect to the dissolution of the marriage tie as to every other State, whilst having no right to save its own power in the premises from annihilation.

But let us consider the particular clause of the Constitution of the United States which is relied upon, in order to ascertain whether such an abnormal and disastrous result can possibly arise from its correct application.

The provision of the Constitution of the United States in question is section 1 of article IV, providing that "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." The argument is that, even although the Massachusetts statute but announces a rule of public policy, in a matter purely local, nevertheless it violates this clause of the Constitution. The decree of the court of another State, it is insisted, and not the relation of the parties to the State of Massachusetts and their subjection to its lawful authority, is what the Constitution of the United States considers in requiring the State of Massachusetts to give due faith and credit to the judicial proceedings of the courts of other States. This proposition, however, must rest on the assumption that the Constitution has destroyed those rights of local self-government which it was its purpose to preserve. It, moreover, presupposes that the determination of what powers are reserved and what delegated by the Constitution is to be ascertained by a blind adherence to mere form in disregard of the substance of things. But the settled rule is directly to the contrary. Reasoning from analogy, the unsoundness of the proposition

emonstrated. Thus, in enforcing the clause of the Constitution for-
ling a State from impairing the obligations of a contract, it is settled
the decisions of this court, although a State, for adequate consider-
n, may have executed a contract sanctioning the carrying on of a
ery for a stated term, no contract protected from impairment under
Constitution results, because, disregarding the mere form and looking
ubstance, a State may not, by the application of the contract clause of
Constitution, be shorn of an ever inherent authority to preserve the
blic morals by suppressing lotteries. (*Stone* v. *Mississippi*, 101 U. S.
4; *Douglas* v. *Kentucky*, 168 U. S. 488.) In other words, the doctrine
that although a particular provision of the Constitution may seemingly
applicable, its controlling effect is limited by the essential nature of
e powers of government reserved to the States when the Constitution
s adopted. In view of the rule thus applied to the contract clause of
e Constitution, we could not maintain the claim now made as to the
fect of the due faith and credit clause, without saying that the States
ust, in the nature of things, always possess the power to legislate for the
eservation of the morals of society, but that they need not have the con-
nued authority to save society from destruction.

Resort to reasoning by analogy, however, is not required, since the prin-
ple which has been applied to the contract clause has been likewise
nforced as to the due faith and credit clause.

In *Thompson* v. *Whitman*, (1874) 18 Wall. 457, the action in the court
elow was trespass for the conversion of a sloop, her tackle, furniture, &c.,
pon a seizure for an alleged violation of a statute of the State of New
Jersey. By special plea in bar the defendant set up that the seizure was
nade within the limits of a named county, in the State of New Jersey, and
by answer to this plea the plaintiff took issue as to the place of seizure, thus
challenging the jurisdiction of the justices who had tried the information
and decreed the forfeiture and sale of the property. The precise point
involved in the case, as presented in this court, was whether or not error had
been committed by the trial court in receiving evidence to contradict the
record of the New Jersey judgment as to jurisdictional facts asserted
therein, and especially as to facts stated to have been passed upon by the
court which had rendered the judgment. It was contended that to permit
the jurisdictional facts, which were foreclosed by the judgment, to be re-
examined would be a violation of the due faith and credit clause of the
Constitution. This court, however, decided to the contrary, saying:

"We think it clear that the jurisdiction of the court by which a judg-
ment is rendered in any State may be questioned in a collateral proceed-
ing in another State, notwithstanding the provisiou of the fourth article of
the Constitution and the law of 1790, and notwithstanding the averments
contained in the record of the judgment itself."

The ground upon which this conclusion was predicated is thus embodied in an excerpt made from the opinion delivered by Mr. Chief Justice Marshall, speaking for the court, in *Rose* v. *Himely*, (4 Cranch, 269,) where it was said:

"Upon principle it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without its jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."

And the same principle, in a different aspect, was applied in *Wisconsin* v. *Pelican Insurance Co.*, (1888) 127 U. S. 215. In that case the State of Wisconsin had obtained a money judgment in its own courts against the Pelican Insurance Company, a Louisiana corporation. Availing itself of the original jurisdiction of this court, the State of Wisconsin brought in this court an action of debt upon the judgment in question. The answer of the defendant was to the effect that the judgment was not entitled to extra-territorial enforcement, because the claim upon which it was based was a penalty imposed upon the corporation for an alleged violation of the insurance laws of the State of Wisconsin. The answer having been demurred to, it was, of course, conceded that the claim which was merged in the judgment was such a penalty. This court, having concluded that ordinarily a penalty imposed by the laws of one State could have no extra-territorial operation, came then to consider whether, under the due faith and credit clause of the Constitution of the United States, a judgment rendered upon a penal statute was entitled to recognition outside of the State in which it had been rendered, because the character of the cause of action had been merged in the judgment as such. In declining to enforce the Wisconsin judgment and in deciding that, notwithstanding the judgment and the due faith and credit clause of the Constitution, the power existed to look back of the judgment and ascertain whether the claim which had entered into it was one susceptible of being enforced in another State, the court, speaking through Mr. Justice Gray, said (p. 291):

"The application of the rule to the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they

were rendered. (Const. art. 4, sec. 1; Act May 26, 1790, chap. 11, 1 Stat. at L. 122; Rev. Stat. § 905.)

"Those provisions establish a rule of evidence, rather than of jurisdiction. While they make the record of a judgment, rendered after due notice in one State, conclusive evidence in the courts of another State or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. (*Hanley* v. *Donoghue*, 116 U. S. 1, 4.)

"In the words of Mr. Justice Story, cited and approved by Mr. Justice Bradley speaking for this court, 'The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments.' (Story, Confl. L. § 609; *Thompson* v. *Whitman*, 18 Wall. 457, 462, 463.)

"A judgment recovered in one State, as was said by Mr. Justice Wayne, delivering an earlier judgment of this court, 'does not carry with it into another State the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State it must be made a judgment there, and can only be executed in the latter as its laws may permit.' (*McElmoyle* v. *Cohen*, 13 Pet. 312, 325.)

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it, and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

2. When the principles which we have above demonstrated by reason and authority are applied to the question in hand, its solution is free from difficulty. As the State of Massachusetts had exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and consequently the authority to prohibit them from perpetrating a fraud upon the law of their domicil by temporarily sojourning in another State, and there, without acquiring a *bona fide* domicil, procuring a decree of divorce, it follows that the South Dakota decree relied upon was rendered by a court without jurisdiction, and hence the due faith and credit clause of the Con-

stitution of the United States did not require the enforcement of such decree in the State of Massachusetts against the public policy of that State as expressed in its statutes. Indeed, this application of the general principle is not open to dispute, since it has been directly sustained by decisions of this court. (*Bell* v. *Bell*, 181 U. S. 175; *Streitwolf* v. *Streitwolf*, 181 U. S. 179.) In each of these cases it was sought in one State to enforce a decree of divorce rendered in another State, and the authority of the due faith and credit clause of the Constitution was invoked for that purpose. It having been established in each case that at the time the divorce proceedings were commenced, the plaintiff in the proceedings had no *bona fide* domicil within the State where the decree of divorce was rendered, it was held, applying the principle announced in *Thompson* v. *Whitman*, *supra*, that the question of jurisdiction was open for consideration, and that as in any event domicil was essential to confer jurisdiction, the due faith and credit clause did not require recognition of such decree outside of the State in which it had been rendered. A like rule, by inverse reasoning, was also applied in the case of *Atherton* v. *Atherton*, (181 U. S. 155.) There a decree of divorce was rendered in Kentucky in favor of a husband who had commenced proceedings in Kentucky against his wife, then a resident of the State of New York. The courts of the latter State having in substance refused to give effect to the Kentucky divorce, the question whether such refusal constituted a violation of the due faith and credit clause of the Constitution was brought to this court for decision. It having been established that Kentucky was the domicil of the husband and had ever been the matrimonial domicil, and, therefore, that the courts of Kentucky had jurisdiction over the subject matter, it was held that the due faith and credit clause of the Constitution of the United States imposed upon the courts of New York the duty of giving effect to the decree of divorce which had been rendered in Kentucky.

But it is said that the decrees of divorce which were under consideration in *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf* were rendered in *ex parte* proceedings, the defendants having been summoned by substituted service, and making no appearance; hence, the case now under consideration is taken out of the rule announced in those cases, since here the defendant appeared and consequently became subject to the jurisdiction of the court by which the decree of divorce was rendered. But this disregards the fact that the rulings in the cases referred to were predicated upon the proposition that jurisdiction over the subject matter depended upon domicil, and without such domicil there was no authority to decree a divorce. This becomes apparent when it is considered that the cases referred to were directly rested upon the authority of *Thompson* v. *Whitman*, *supra*, where the jurisdiction was assailed, not because there was no

power in the court to operate, by *ex parte* proceedings, on the *res*, if jurisdiction existed, but solely because the *res* was not at the time of its seizure within the territorial sway of the court, and hence was not a subject matter over which the court could exercise jurisdiction by *ex parte* or other proceedings. And this view is emphasized by a consideration of the ruling in *Wisconsin* v. *Pelican Insurance Company, supra*, where the judgment was one *inter partes*, and yet it was held that, in so far as the extra-territorial effect of the judgment was concerned, the jurisdiction over the subject matter of the State and its courts was open to inquiry, and if jurisdiction did not exist the enforcement of the judgment was not compelled by reason of the due faith and credit clause of the Constitution.

Indeed, the argument by which it is sought to take this case out of the rule laid down in the cases just referred to and which was applied to decrees of divorce in the Bell and Streitwolf cases practically invokes the overruling of those cases, and in effect, also, the overthrow of the decision in the Atherton case, since, in reason, it but insists that the rule announced in those cases should not be applied merely because of a distinction without a difference.

This is demonstrated as to *Thompson* v. *Whitman* and *Wisconsin* v. *Pelican Insurance Co.*, by the considerations already adverted to. It becomes clear, also, that such is the result of the argument as to *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf*, when it is considered that in both those cases it was conceded, *arguendo*, that the power to decree the divorce in *ex parte* proceedings by substituted service would have obtained if there had been *bona fide* domicil. The rulings made in the case referred to hence rested not at all upon the fact that the proceedings were *ex parte*, but on the premise that there being no domicil there could be no jurisdiction. True it is, that in *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf* the question was reserved whether jurisdiction to render a divorce having extra-territorial effect could be acquired by a mere domicil in the State of the party plaintiff, where there had been no matrimonial domicil in such State—a question also reserved here. But the fact that this question was reserved does not affect the issue now involved, since those cases proceeded, as does this, upon the hypothesis conceded, *arguendo*, that if there had been domicil there would have been jurisdiction, whether the proceedings were *ex parte* or not, and therefore the ruling on both cases was that at least domicil was in any event the inherent element upon which the jurisdiction must rest, whether the proceedings were *ex parte* or *inter partes*. And these conclusions are rendered certain when the decision in *Atherton* v. *Atherton* is taken into view, for there, although the proceeding was *ex parte*, as it was found that *bona fide* domicil, both personal and matrimonial, existed in Kentucky, jurisdiction over the subject matter was held to

obtain, and the duty to enforce the decree of divorce was consequently declared. Nor is there force in the suggestion that because in the case before us the wife appeared, hence the South Dakota court had jurisdiction to decree the divorce. The contention stated must rest on the premise that the authority of the court depended on the appearance of the parties and not on its jurisdiction over the subject matter—that is, *bona fide* domicil, irrespective of the appearance of the parties. Here again the argument, if sustained, would involve the overruling of *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf*. As in each of the cases jurisdiction was conferred, as far as it could be given, by the appearance of the plaintiff who brought the suit, it follows that the decision that there was no jurisdiction because of the want of *bona fide* domicil was a ruling that in its absence there could be no jurisdiction over the subject matter irrespective of the appearance of the party by whom the suit was brought. But it is obvious that the inadequacy of the appearance or consent of one person to confer jurisdiction over a subject matter not resting on consent includes necessarily the want of power of both parties to endow the court with jurisdiction over a subject matter, which appearance or consent could not give. Indeed, the argument but ignores the nature of the marriage contract and the legislative control over its dissolution which was pointed out at the outset. The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil. The proposition relied upon, if maintained, would involve this contradiction in terms: that marriage may not be dissolved by the consent of the parties, but that they can, by their consent, accomplish the dissolution of the marriage tie by appearing in a court foreign to their domicil and wholly wanting in jurisdiction, and may subsequently compel the courts of the domicil to give effect to such judgment despite the prohibitions of the law of the domicil and the rule of public policy by which it is enforced.

Although it is not essential to the question before us, which calls upon us only to determine whether the decree of divorce rendered in South Dakota was entitled to extra-territorial effect, we observe, in passing, that the statute of South Dakota made domicil, and not mere residence, the basis of divorce proceedings in that State. As without reference to the statute of South Dakota and in any event domicil in that State was essential to give jurisdiction to the courts of such State to render a decree of divorce which would have extra-territorial effect, and as the appearance of one or both of the parties to a divorce proceeding could not suffice to confer jurisdiction over the subject matter where it was wanting because of the absence of domicil within the State, we conclude that no violation of

the due faith and credit clause of the Constitution of the United States arose from the action of the Supreme Judicial Court of Massachusetts in obeying the command of the State statute and refusing to give effect to the decree of divorce in question.

Affirmed.

Mr. Justice BREWER Mr. Justice SHIRAS and Mr. Justice PECKHAM dissent.

Mr. Justice HOLMES, not being a member of the court when the case was argued, takes no part.

True copy.

Test:

Clerk Supreme Court, U. S.